Supreme Court, U.S.
FILED

95 • 633 OCT 12 1995

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

RICO ARNEZ SANDERS
RESPONDENT

ON CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

A PETITION FOR A WRIT OF CERTIORARI

ELWOOD L. BROWN
Prosecuting Attorney
County of St. Clair

**PETER R. GEORGE
Chief Assistant Prosecuting Attorney
301 County Building
Port Huron, Michigan 48060
(810) 985-2400

TIMOTHY K. MORRIS
Assistant Prosecuting Attorney

**Counsel of Record

26 pp

QUESTION PRESENTED

MAY A DEFENDANT, WHO HAS OBTAINED COUNSEL FOLLOWING ARRAIGNMENT, AND THROUGH THAT COUNSEL, REQUESTED A POLICE ADMINISTERED POLYGRAPH EXAMINATION, AND WHO IS WARNED, BEFORE AND AFTER THE POLYGRAPH EXAMINATION, PURSUANT TO *ARIZONA V MIRANDA*, 384 US 436; 88 S Ct 1135; 89 L Ed 2d 694 (1966), OF HIS RIGHT TO HAVE COUNSEL PRESENT DURING QUESTIONING, AND THAT HIS STATEMENTS WILL BE USED AGAINST HIM IN COURT, WHO WAIVES THE PRESENCE OF COUNSEL AND ACKNOWLEDGES THE WARNING, BEFORE AND AFTER THE POLYGRAPH EXAMINATION, AND CONFESSES TO THE CRIME IN TWO SEPARATE INTERVIEWS CONDUCTED IMMEDIATELY AFTER THE POLYGRAPH EXAMINATION, HAVE HIS CONFESSIONS SUPPRESSED BY CLAIMING HIS WAIVER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL WAS INVALID BECAUSE COUNSEL WAS NOT PRESENT TO AGREE TO HIS WAIVER OF COUNSEL'S PRESENCE?

TABLE OF CONTENTS

QUESTION PRESENTED 1

INDEX OF AUTHORITIES 3

OPINIONS BELOW 5

STATEMENT OF JURISDICTION 5

CONSTITUTIONAL PROVISIONS INVOKED 6

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 12

CONCLUSION 21

APPENDIX

"A" Opinion of the Michigan Court of Appeals 1A

"B" Order of the Michigan Supreme Court 3A

INDEX OF AUTHORITIES

CASES — Page(s)

Edwards v Arizona, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981) 17, 18

Johnson v Zerbst, 304 US 458; 58 S Ct 1019; 83 L Ed 2d 1461 (1938) 20

Main v Moulton, 474 US 159; 106 S Ct 477; 88 L Ed 2d 481 (1985) 17, 18

Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986) 17, 19

Michigan v Long, 463 US 1032, 1042; 103 S Ct 3469; 77 L Ed 2d 1201 (1983) 17

Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966) 1, 8, 12

Patterson v Illinois, 487 US 285; 108 S Ct 2389; 101 L Ed 2d 261 (1988) 15, 16, 18, 19

Wyrick v Fields, 459 US 42; 103 S Ct 394; 74 L Ed 2d 214 (1982) 14, 18

People v Gonyea, 421 Mich 462; 365 NW 2d 136 (1984) . . 16

People v Leonard, 421 Mich 207; 354 NW 2d 625 (1984) 13, 15, 16

People v Ray, 431 Mich 260; 430 NW 2d 626 (1988) . . 13, 14

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

RICO ARNEZ SANDERS,
RESPONDENT

NOW COME the People of the State of Michigan, by Elwood L. Brown, Prosecuting Attorney for the County of St. Clair, and Peter R. George, Chief Assistant Prosecuting Attorney, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, issued October 25, 1994, leave denied by the Michigan Supreme Court on July 12, 1995, two justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, and is appended as Appendix A. The order of the Michigan Supreme Court is unreported at this time and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgement of the Michigan Court of Appeals was entered October 25, 1994. The Michigan Supreme Court denied discretionary appeal, with two justices dissenting from the denial, on Petitioner's motion for reconsideration on July 12, 1995. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

CONSTITUTIONAL PROVISIONS INVOKED

The **Fifth Amendment** to the United States Constitution provides: "No person. . .shall be compelled to be a witness against himself. . . ."

The **Sixth Amendment** to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense."

The **Fourteenth Amendment** to the United States Constitution provides: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 20 of the Michigan Constitution of 1963 provides: "In every criminal prosecution, the accused shall have the right. . . to have the assistance of counsel for his defense. . . ."

STATEMENT OF THE CASE

Respondent was convicted of two counts of felony first degree murder and two counts of possession of a firearm during the commission of a felony. He received two concurrent sentences of life imprisonment for the murder convictions, and two sentences of two years, concurrent to each other, but consecutive to the murder sentences, for the firearm offenses.

Respondent and his co-defendant were arrested on 27 March 1991. Respondent requested counsel at his arraignment and Ronald Flanigan was appointed to represent him.

Early in April of 1991, Respondent directed his attorney to secure for him the opportunity to take a polygraph examination on the issue of whether he or his co-defendant was the direct actor in the two homicides. That is, Respondent insisted a polygraph would "clear" him of actually pulling the trigger. Mr. Flanigan advised against this, based on his many years experience as both an assistant prosecutor and a criminal defense practitioner. Respondent insisted and counsel asked the prosecutor to arrange for a Michigan State

Police polygraph examiner to administer a test to respondent. Counsel advised Respondent not to talk to the examiner except as necessary to take the test, and not to talk to the examiner or any other police officers after the polygraph.

During the pretest interview, Respondent was Mirandized[1] and signed a Michigan State Police form detailing his rights, acknowledging that he was waiving those rights, and acknowledging the fact that anything he said would be used against him. He then told the examiner a detailed story about how he and his co-defendant had been driven from Detroit to Port Huron and dropped off for the express purpose of selling crack cocaine. He told how they were able to sell over $1000 of cocaine during the time they were in town. He explained how he and the co-defendant decided to kill the two victims and take their car in order to avoid paying the victims for taking them back to Detroit. He explicitly placed the gun in the co-defendant's hand, and the actual shooting squarely on the co-

---

[1]Arizona v Miranda, 384 US 436; 86 S Ct 1602; 89 L Ed 2d 694 (1966).

defendant's shoulders, limiting his own part to that of a co-conspirator and accessory after the fact.

In the opinion of the polygraph examiner, Respondent's charts indicated deception, in whole or in part. When he was advised of this, Respondent admitted that he was, in fact, the "shooter," and reiterated the same story he told in the pre-examination interview. This time, however, admitting he was the one who had the gun, and he was the one who shot each victim in the back.

The polygraph examiner told the Port Huron Police Detective who had escorted Respondent to the State Police facility that Respondent might have something to say to him. The Detective advised Respondent of his right to have counsel present during any questioning and warned him that anything he said would be used against him. Respondent, again, waived the presence of counsel and spoke to the Detective. Respondent told the Detective essentially the same version of events that he had related to the polygraph examiner after the polygraph.

Subsequently, Respondent expressed dissatisfaction with his attorney's performance, alleging he had "misrepresented" him, and Mr. Flanigan was allowed to withdraw. New counsel was appointed and made his first order of business an attack on the voluntariness of Respondent's statements to the officers based on violation of his rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution. A evidentiary hearing on this issue was held on 19 August 1991. Both the polygraph examiner and the Port Huron Police Detective testified. Respondent declined to testify. Based on the statements of the officers, and copies of correspondence between Mr. Flanigan and the prosecutor, the trial court found Respondent had initiated the contact with the police, had been properly Mirandized before each statement, and that both statements were freely and voluntarily made, and no violation of Respondent's constitutional rights occurred.

The Michigan Court of Appeals disagreed and reversed. That court held that Respondent's rights under the Sixth Amendment to the United States Constitution were violated when Petitioner only

proved that Respondent told the officers that he understood his Miranda rights, and that he waived those rights. That is, that when a criminal defendant has counsel, some undefined higher standard is required for that defendant to waive the presence of counsel at an interview initiated by the defendant. The court thus held that the Respondent's multiple confessions were improperly admitted, reversing the convictions and suppressing the confession on any retrial.

Petitioner sought leave to appeal to the Michigan Supreme Court, which was ultimately denied on 12 July 1995 with two justices dissenting.

REASONS FOR GRANTING THE WRIT

This Court has had numerous occasions to discuss the interplay of the right to the assistance of counsel, and the conditions required for a valid waiver of that right, under both the Fifth and Sixth Amendments. The instant case presents a factual basis not previously analyzed by this Court under the Sixth Amendment. It also presents the interesting situation where it appears the Michigan Court of Appeals believes that a criminal defendant may disregard the advise of his attorney, confess his crimes to police officers following repeated *Miranda*[2] warnings, (and the concomitant waiver of the rights set out therein) and then successfully claim his Sixth Amendment right to counsel was violated and his repeated waiver of the right was invalid because his *attorney* did not agree that he could talk to the police without the attorney present!

On direct appeal, following his convictions, Respondent relied exclusively on the Sixth Amendment (and the parallel provision of the Michigan Constitution, Const 1963, art 1, § 20) in his

---

[2]*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

argument that the confessions had been improperly admitted. Respondent cited two Michigan Supreme Court cases, *People v Leonard*, 421 Mich 207; 354 NW 2d 625 (1984), and *People v Ray*, 431 Mich 260; 430 NW 2d 626 (1988), for the proposition that the Sixth Amendment and Const 1963, art 1, § 20, provide a basis for finding some right of the Respondent's attorney to "trump" his client's waiver of his presence at an interrogation initiated by Respondent. Sadly enough for defense attorneys everywhere, neither case stands for anything of the sort.

In *Leonard*, the opinion of the court, a one page, *per curiam* opinion, acknowledged that the Michigan Court of Appeals had based *its* decision on Sixth Amendment grounds, *Leonard*, 421 Mich at 210, but premised its own holding that the statements in issue in that case should not have been admitted on the completely non-constitutional basis that allowing the statements violated the terms of a pre-trial stipulation between the prosecutor and defense counsel. *Id.*

In *Ray*, insofar as the case pertains to the matter at hand, the issue was whether failure to re-advise the defendant of his *Miranda* rights at the conclusion of a polygraph examination would prevent a voluntary and intelligent waiver of those rights, per se. *Ray*, 431 Mich at 276. Relying on this Court's holding in *Wyrick v Fields*, *infra*, the Michigan court adopted a "totality of the circumstances" test for determining whether the waiver of a defendant's *Fifth Amendment* rights could be considered knowing and voluntary. *Id.* Contrary to Respondent's representations to the Michigan Court of Appeals, the Sixth Amendment is mentioned only in passing, *Ray*, 431 Mich at 273-274, and Michigan's own, similar constitutional provisions not at all.

In a further effort to bolster his rather amazing claim that his repeated acknowledgment of *Miranda* warnings, and repeated agreements to speak with police officers without the presence of his attorney, despite those warnings, should somehow be ignored, Respondent attempted to find a more rigorous standard for waiver of constitutional rights under Michigan case law. It appears the sole

purpose of this effort was to forestall any attempt to petition this Court should he prevail in the Michigan courts. Despite the mechanical recitation of Michigan's equivalent constitutional provision, along with the Sixth Amendment, by the Michigan Court of Appeals, it is clear from the case that court relied upon that the *only* right to counsel that was in issue was the one found in the Sixth Amendment. Indeed, as noted above, ***the opinion of the court*** in ***People v Leonard***, 421 Mich 207, expressly observed that it was unnecessary to invoke any constitutional protections to find the statements of that defendant inadmissible. Both Respondent, in his initial brief on appeal, and the Michigan Court of Appeals, in its brief opinion, cite to ***dicta*** in the separate opinion of Chief Justice Williams (see *Leonard*, 421 Mich at 210-228), to argue that there is a more rigorous test for waiver of the Sixth Amendment (or Const 1963, art 1, § 20) right to counsel. In point of fact, the test proposed by Chief Justice Williams, and apparently relied upon by the Michigan Court of Appeals in finding Respondent's waiver invalid, is very much like the test rejected by this Court in *Patterson v Illinois*,

487 US 285, at 298-299. It should also be noted that Chief Justice Williams, while claiming to formulate a test under Michigan's Constitution, relied almost exclusively on Federal Sixth Amendment cases[3] (all but one from this Court) in crafting his proposed standard. See *Leonard*, 421 Mich at 216, 218-221, 222.

Although the Court of Appeals chose not to cite to it, Respondent, in pursuit of some independent state grounds to support his position, cited *People v Gonyea*, 421 Mich 462; 365 NW 2d 136 (1984), where three justices voted to reverse based on Const 1963, art 1, § 20, but fails to note that this was a 3-1-3 opinion where the concurring justice based his agreement strictly on the Sixth Amendment. *Gonyea*, at 482. (Cavanagh, J., concurring.) In short, while the Michigan Court of Appeals *could* have made its decision on independent State grounds under Const 1963, art 1, § 20, there is no evidence that it did so, save for the passing reference to the State

---

[3]The Chief Justice also appears to have considered, if not relied upon, some of the cases and commentators which were also rejected by this Court in *Patterson*. See *Patterson*, 487 US at 295 n 8, 297 n 10 and *Leonard*, 421 Mich at 223 ns 11-13.

constitutional provision. When it is not clear from the record that there were independent and adequate state grounds for the decision, and when it fairly appears that the state court rested its decision on federal law, this Court will assume there are no such grounds. *Michigan v Long*, 463 US 1032, 1042; 103 S Ct 3469; 77 L Ed 2d 1201 (1983).

Looking to this Court's cases involving the right to counsel, and its waiver, we find the following. In *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), it was held that once a defendant, in custody, invokes his right to have counsel present during interrogation, questioning must stop until that right has been honored ***unless*** the defendant affirmatively initiates further communications with the police. *Edwards* was a Fifth Amendment case. *Edwards*, 451 US at 480-81, 482, 484-86.

In *Main v Moulton*, 474 US 159; 106 S Ct 477; 88 L Ed 2d 481 (1985), and *Michigan v Jackson*, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), this Court made it clear that the Sixth Amendment right to Counsel afforded similar protection to a crimi-

nal defendant *after* the institution of formal charges. *Moulton*, 474 US at 170, *Jackson* 475 US at 629. Further, the Sixth Amendment places an affirmative duty on the State to respect and preserve defendants' decisions to avail themselves of this protection. *Moulton*, 474 US at 171. In order to effectuate this policy, *Jackson* extended the rule of *Edwards* to those situations where a defendant has asserted his Sixth Amendment right to counsel after an arraignment or similar proceeding. *Jackson*, 475 US at 636. Previously, in *Wyrick v Fields*, 459 US 42; 103 S Ct 394; 74 L Ed 2d 214 (1982), this Court clarified *Edwards*, and held that even after the defendant has acquired counsel, the *Fifth Amendment*[4] right to counsel was waived when the defendant initiated *interrogation* by requesting the police provide a polygraph examination. *Fields*, 459 US at 47-48. Similarly, *Patterson v Illinois*, 487 US 285; 108 S Ct 2389; 101 L Ed 2d 261 (1988), held that after the Sixth Amendment right to counsel has attached, but before counsel has been obtained,

---

[4]In *Fields* this Court expressly found that the lower court relied "exclusively" on the Fifth Amendment in its opinion. *Fields*, 459 US at 49.

that right may be waived via the mechanism of properly administered *Miranda* warnings.

The instant case represents the convergence of the Fifth and Sixth amendment right to counsel law of this Court, and provides the Court with a clear vehicle for answering the question of whether, given defendant initiated communication in accordance with *Michigan v Jackson*, waiver of the Sixth Amendment right to counsel requires something more than *Miranda* once the defendant has actually obtained the assistance of counsel. *Patterson*, *supra*, 487 US at 296 n 9.

The Michigan Court of Appeals, and undoubtedly other courts as well, continue to ignore the clear meaning of this Court's holding in *Patterson v Illinois*, and its effect on a defendant's ability to waive counsel for out of court proceedings and investigations. However, situations such as the instant case may, indeed, fall outside the purview of *Patterson*, because, unlike Patterson, the Respondent in this case *had* requested and obtained the assistance of counsel. See *Patterson*, 487 US at 296 n 9.

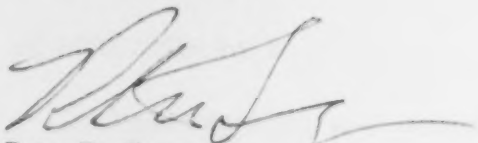
Waiver of a constitutional right, particularly the right to counsel in a criminal prosecution, is always a serious matter and should be examined closely. *Johnson v Zerbst*, 304 US 458; 58 S Ct 1019; 83 L Ed 2d 1461 (1938). Clearly, a waiver obtained by trickery or other misconduct by the state in derogation of the relationship between a defendant and his attorney should not be allowed to stand. However, there is a point at which a defendant must be accountable for his own actions in derogation of that relationship. Respondent believes this case fairly presents the question of how far, in the context of the criminal justice system, does the existence of an attorney-client relationship go toward limiting the defendant's responsibility for his actions when he attempts to handle the out of court aspects of the case on his own behalf . Put another way; When the Sixth Amendment says "the assistance of counsel" does it mean *assistance* of counsel or *control* by counsel? This is an issue that is important to the constitutional jurisprudence of the Nation and should be reviewed by this Court..

CONCLUSION

WHEREFORE, Petitioner respectfully submits that plenary review is warranted, and requests that certiorari be granted.

Respectfully submitted,

Elwood L. Brown
Prosecuting Attorney
County of St. Clair



Peter R. George
Chief Assistant Prosecuting Attorney
301 County Building
Port Huron, Michigan 48060
Phone: 810 985-2400

APPENDIX A COURT OF APPEALS OPINION

APPENDIX A: COURT OF APPEALS OPINION

PEOPLE V RICO ANNEZ SANDERS

DOCKET NO. 145890 UNPUBLISHED

OCTOBER 25, 1994

Before: HOLBROOK, JR., P.J., and McDonald and R.L. Evans, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of two counts each of first-degree felony murder, MCL 750.316; MSA 28.548, and felony-firearm, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for each of the murder convictions and to two years' consecutive imprisonment for the felony-firearm convictions. He now appeals as of right. We reverse and remand for a new trial.

Plaintiff failed to show that defendant knowingly and intelligently waived his right to counsel's presence at this polygraph interview. US Const, Am VI; Const 1963, art 1, §20.

APPENDIX A COURT OF APPEALS OPINION

Plaintiff showed no more than defendant's affirmative responses to the questions of whether he understood his Miranda rights (Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 [1966]) and whether he relinquished those rights. People v Leonard, 421 Mich 207, 424[Sic]; 364 NW2d 625 (1984). Evidence of the polygraph examination should not have been admitted at trial. Because we cannot conclude that the error was harmless, we reverse defendant's convictions and remand for a new trial.

In light of our resolution of defendant's first issue, we need not address his remaining claims.

Reversed and remanded for a new trial. We do not retain jurisdiction.

Donald E. Holbrook, Jr.
Gary R. McDonald
Robert L. Evans

APPENDIX B: MICHIGAN SUPREME COURT ORDER

APPENDIX B: ORDER OF MICHIGAN SUPREME COURT

ORDER

Entered: July 12, 1995

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant,

SC: 102124

V COA: 145890

LC: 91-000879-FH

RICO ARNEZ SANDERS,

Defendant-Appellee.

_____/

On order of the Court, the motion for reconsideration of this Court's order of March 31, 1995 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

APPENDIX B: MICHIGAN SUPREME COURT ORDER

Boyle and Weaver, JJ., would grant the motion for reconsideration, and on reconsideration would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the forgoing is a true and complete copy of the order entered at the direction of the Court.

July 12, 1995 /s/ Corbin R. Davis
Clerk